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October 7, 1996

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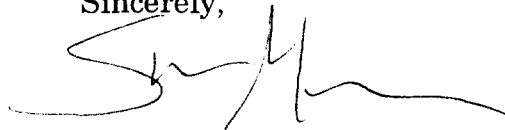
Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 96-171
RM-8846

Dear Mr. Caton:

Enclosed for filing please find an original and four copies of the Comments, Counterproposal and Response to Order to Show Cause of KHWY (California), L.P. in the above-referenced proceeding. Please date stamp the additional copy of this filing and return it to our messenger.

Sincerely,



Steven F. Morris

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-171
Table of Allotments,) RM-8846
FM Broadcast Stations)
(Indian Springs, Nevada, Mountain)
Pass, California, Kingman, Arizona,)
and St. George, Utah))

To: Chief, Allocations Branch
Mass Media Bureau

**COMMENTS, COUNTERPROPOSAL AND RESPONSE
TO ORDER TO SHOW CAUSE**

KHWY (California), L.P. ("KHWY"), licensee of station KHYZ(FM), Mountain Pass, California, by its attorneys, hereby responds to the Commission's Notice of Proposed Rulemaking and Order to Show Cause in the above-referenced docket. 1/ KHWY is not opposed to the provision of service to the area surrounding Indian Springs, Nevada, so long as KHYZ's established operations on Channel 258B are not disrupted. This goal can be accomplished by the allotment of Channel 272C instead of the requested Channel 257C, as described in the counterproposal contained herein.

1/ Notice of Proposed Rulemaking and Order to Show Cause, MM Docket No. 96-171, DA 96-1271 (released August 16, 1996). The Notice set October 7, 1996 for the filing of comments.

I. INTRODUCTION

In her Petition for Rulemaking, Claire Benezra (“Benezra”), permittee of KPXC(FM), Indian Springs, Nevada, requests the substitution of Channel 257C for 257A at Indian Springs. Benezra states that her proposal will provide first reception service to a “white area” with over 1500 residents, a highway (US 95) and various federal properties. To accommodate the allotment of 257C at Indian Springs, Benezra has requested the substitution of three channels, including KHYZ’s channel at Mountain Pass, California. 2/

KHWY does not dispute that the allotment of a Class C facility to Indian Springs, if constructed, could advance the public interest by providing “white area” coverage. However, allotting Channel 257C to Indian Springs, as proposed, is not the most efficient method of increasing white area coverage. Instead, allotting Channel 272C to Indian Springs (at nearby reference coordinates) will provide greater white area coverage and service to the highway, without the need for any of the substitutions required to accommodate Benezra’s proposal. Accordingly, the Commission should allot Channel 272C to Indian Springs.

2/ One of the other stations, KSGI-FM, St. George, Utah, has consented to the proposed substitution. The other station that would be required to move channel, and which like KHYZ has not consented, is KGMN(FM), Kingman, Arizona.

**II. ALLOTING CHANNEL 272C TO INDIAN SPRINGS WILL
MAXIMIZE THE PUBLIC BENEFIT AND MINIMIZE THE
BURDEN ON NEIGHBORING STATIONS.**

KHWY's counterproposal to allot Channel 272C to Indian Springs is preferable to Benezra's proposal. As described in the attached engineering statement, more white areas and increased population would be served by an Indian Springs facility at Channel 272C. Indeed, the counterproposal will serve a white area more than 70 percent larger than the original proposal and provide twice as many residents with their first aural service. See attached Engineering Statement at 5.

Importantly, KHWY's counterproposal does not require any other channel substitutions. The Commission has recognized that channel substitutions are a burden for licensees and an inconvenience for listeners; consequently it only permits substitutions when they are justified by public interest benefits. ^{3/} In this case, KHWY's counterproposal eliminates the need for substitutions without sacrificing the public interest benefits of allotting a Class C channel to Indian Springs. Under such circumstances, it would not be in the public interest to modify three existing licenses when alternative channels can provide the desired service.

It would be particularly contrary to the public interest to change the long-established channel of KHYZ, which, with its sister station, KRXV(FM),

^{3/} *Blair, Nebraska*, 8 FCC Rcd 4086, 4087 n.8 (1993) ("The Commission recognizes that changing a station's channel may be disruptive to both the station's operation and its listenership and thus will order such a change only where we find the public interest benefits flowing from the change outweigh the benefit which comes from maintaining channel continuity.").

Yermo, California, provides a unique safety service for travelers across the Mojave Desert.

By way of background, KHWY recognized the unmet need of the millions of yearly travelers across the harsh Mojave Desert when it conceived of locating dual radio stations on nearby frequencies along Interstate 15 to provide 24-hour access to road, weather and emergency information. The Broadcast Bureau agreed, and in its Yermo/Mountain Pass allotment order stated "we recognize that the transient population on Interstate 15 also has a need for radio service * * *." *See Yermo and Mountain Pass, CA*, 45 RR 2d 58, 59 [¶ 5] (Broadcast Bureau 1979).

Because the travelers had, and continue to have, no other alternative for continuous 24-hour safety information along this hazardous route, KHWY applied for, and received in 1985 a waiver of the Commission's rules to increase the effective radiated power of KHYZ from 2.29 kilowatts to 10 kilowatts, in excess of the normal Class B maximum. *See FCC File No. BPH-820714AB* (granted May 22, 1985).

The Commission again acknowledged the special safety role of KHWY's Mountain Pass and Yermo stations when it granted a main studio waiver in 1992 to co-owned station KHWY(FM), Essex, California, which serves travelers along Interstate 40, the desert highway to the south of Interstate 15. *See FCC File No. BMPH-920312IE* (granted October 2, 1992). The Chief of the Audio Services Division noted in the KHWY waiver grant (reference number 1800B3-ACS) that "[t]he Commission granted main studio waivers to Stations KRXV and KHYZ partly

because they provide a unique advisory service to travelers on Interstate 15 through the Mojave Desert, and this will be the third such waiver for that purpose.” 4/

As evidence of the critical role of these stations, the California and Nevada Highway Departments have placed signs along Interstate 15 instructing motorists to tune to KHYZ on 99.5 and KRXV on 98.1 for emergency, highway and weather information. Relocating KHYZ on the dial would cause confusion and undermine the safety services provided the millions of motorists who have come to rely on 99.5 for critical travelers’ information.

Further weighing in the public interest balance is that Benezra has not constructed her station, nor even initiated construction, and consequently, no listeners will be affected by operation of KPXC on Channel 272 instead of 257. 5/

In sum, KHWY’s counterproposal provides greater white area coverage, better service to other desired areas, eliminates the need for other contested channel substitutions and does not adversely impact any listeners.

4/ The Commission had granted in the original construction permits for Mountain Pass and Yermo a waiver of the main studio rule to allow co-location of the studios. When the original single main studio in Daggett, California, proved too removed from the California Highway Patrol, San Bernardino County Sheriff and California Department of Transportation offices in Barstow, California, the Commission in 1984 granted another waiver of the main studio rule to relocate the combined main studio to Barstow. See FCC File No. BMPH-840713AE.

5/ In the context of requests for a change of community of license, for example, the Commission has recognized that there is no loss of service associated with moving an unconstructed station. See, e.g., *Bagdad, Arizona*, 11 FCC Rcd 523 (1996).

III. THE COUNTERPROPOSAL SHOULD PERMIT THE COMMISSION TO MODIFY KPXC'S CONSTRUCTION PERMIT WITHOUT ENTERTAINING COMPETING APPLICATIONS FOR A CLASS C ALLOTMENT TO INDIAN SPRINGS

KHWY understands that the Commission's standard policy is to place proposals for non-adjacent channel changes on a public notice to determine if there are other expressions of interest. If no other parties are interested, and if the proposal otherwise complies with the Commission's allotment policies, the Commission will proceed to amend the table of allotments and modify the proponent's permit or license accordingly.

Here, the proposal to allot Channel 272C is being made as a counterproposal by a third party, not by Benezra, the permittee. This counterproposal is being made to accommodate the public interest without the needless disruption of operating stations, including one on which travelers have come to rely for safety information. Under these circumstances, it is submitted that the Commission is justified in implementing the counterproposal without subjecting it to other expressions of interests.

Alternatively, if the Commission does place Channel 272C on notice, there remains another channel -- 276C -- which may be allotted to Indian Springs without the modification of existing stations and which would provide equally improved white-area coverage. See attached Engineering Statement at 2. Consequently, if other parties submit notices of interest in a Class C channel at Indian Springs, the Commission may allow those parties to apply for Channel 276C,

while modifying the KPXC permit to Channel 272C operation (or vice versa). Even if the Commission does not apply this procedure, then it still should adopt the counterproposal and let Benezra apply for the new, non-adjacent Class C allotment(s) along with other applicants, if any. It is submitted that when the proponent's facility has not been constructed, when three other operating stations would have to be modified and two of those stations oppose such modification, when one of the stations has been providing a unique travel advisory service that should not be unduly interrupted, and when there are two other Class C channels that are even more suitable for the proposed service, the Commission's policies favor the counterproposal even if KPXC would obtain an automatic permit modification.

IV. CONCLUSION


KHWY recognizes that the Commission retains the authority to modify the license of KHYZ for due cause and with due process. Here, the cause is not just -- there are better and non-disruptive ways to accomplish the allotment of new service to Indian Springs than as proposed by Benezra. KHYZ's long-standing operations, which have been memorialized by state highway signs and relied upon for years by millions of motorists, should not be disrupted to modify KPXC's unconstructed permit, when other, even more suitable channels will allow that change without disruption. 6/ Accordingly, the Commission should allot

6/ KHWY is also concerned that Benezra, who has not yet even constructed KPXC, might not have the requisite funds to reimburse KHWY for the significant costs of notifying the public of the change of KHYZ's channel.

Channel 272C or 276C to Indian Springs rather than Channel 257C. With these other channels available, the Commission does not have due cause to modify the licenses of KHYZ, KGMN and KSGI-FM. 7/

Respectfully submitted,

KHWY (CALIFORNIA), L.P.

By: 
Marissa G. Repp
Steven F. Morris

Its Attorneys

HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

October 7, 1996

7/ Assuming *arguendo* that the Commission implements Benezra's proposal rather than KHWY's counterproposal and such decision is affirmed after appeal, KHWY respectfully reminds the Commission that KHYZ, due to the waiver of the Class B maximum facilities limits, must be treated as a Class C station for purposes of coordination with the Mexican government.

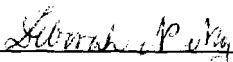
CERTIFICATE OF SERVICE

I, Deborah N. Ng, hereby certify that a copy of the foregoing
"Comments, Counterproposal and Response to Order to Show Cause" has been
served by first class mail this 7th day of October, 1996 on the following:

Jerrold Miller
Miller & Miller
P.O. Box 33003
Washington, D.C. 20033
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Kaye, Scholer, Fierman, Hays & Handler
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Suite 900
Washington, D.C. 20036
Counsel for KSGI-FM



Deborah N. Ng

**ENGINEERING STATEMENT
RE PETITION FOR RULE MAKING
TO AMEND FM TABLE OF ALLOTMENTS
TO ALLOT CHANNEL 272C (102.3 MHZ) TO
INDIAN SPRINGS, NEVADA, AND
DELETE CHANNEL 257A (99.3 MHZ)**

OCTOBER 1996

**COHEN, DIPPELL AND EVERIST, P.C.
CONSULTING ENGINEERS
RADIO AND TELEVISION
WASHINGTON, D.C.**

COHEN, DIPPELL AND EVERIST, P. C.

City of Washington)
) ss
District of Columbia)

Sudhir K. Khanna, being duly sworn upon his oath, deposes and states:

That he is a graduate electrical engineer, a registered professional engineer in the District of Columbia, and is Secretary-Treasurer of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio-Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;

That his qualifications are a matter of record in the Federal Communications Commission;

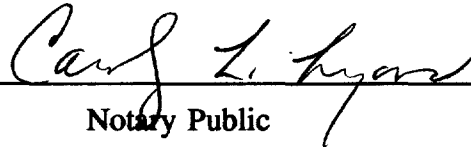
That the attached engineering report was prepared by him or under his supervision and direction; and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts, he believes them to be true.



Sudhir K. Khanna
District of Columbia
Professional Engineer
Registration No. 8057

Subscribed and sworn to before me this 7th day of October, 1996.


Notary Public

My Commission Expires:

2/28/98

This engineering statement has been prepared on behalf of KHYZ (California), L.P., licensee of FM radio station KHYZ, Mountain Pass, California in support of its counter-proposal in MM Docket No. 96-171 for a rule making to allot Channel 257C (99.3 MHz) to Indian Springs, Nevada.

Station KHYZ(FM) currently operates with CP facilities on Channel 258B (99.5 MHz) with 8.4 kW effective radiated power (ERP) and 551 antenna height above average terrain (HAAT).

Claire B Benezra (Benezra), permittee of radio station KPXC(FM) has proposed in MM Docket No. 96-171, substitution of Channel 257C for currently allotted Channel 257A at Indian Springs, Nevada. Benezra's proposal requires a change in KHYZ(FM) operation from Channel 258B to Channel 259B (99.7 MHz) in addition to switching channels of stations KGMN and KSGI-FM.

KHYZ(FM) is proposing to allot Channel 272C(102.3 MHz) to Indian Springs in lieu of Channel 257C as counter-proposal in MM Docket No. 96.171, by amending Section 73.202 of the Commission's Rules, Table of Allotments. Unlike the Benezra proposal, the proposed allotment of Channel 272C to Indian Springs, Nevada does not require switching of any other station's frequency. In addition, as demonstrated later, the proposed operation of Channel 272C would serve more "white" or zero aural service area. KHYZ(FM) believes the proposed high powered operation of KPXC(FM) on a frequency only 2 channels removed from the proposed KHYZ(FM) channel presents a potential of harmful interference to its listenable signal.

KHYZ also requests the Commission to reserve the higher power Channel 272C for FM station KPXC(FM) since other channels can be allotted to Indian Springs. For example, Channel 276C can also be allotted to Indian Springs according to the Commission's rules and policies from the same reference coordinates as specified for the proposed Channel 272C.

Station KPXC(FM) currently is authorized for operation on Channel 257A (99.3 MHz) with 6 kW effective radiated power (ERP) and -51 meters antenna height above average terrain (HAAT). KPXC(FM) has filed a petition for a rule making to amend the Table of Allotments by adding Channel 257C (99.3) at Indian Springs, Nevada. The allotment of Channel 257C to Indian Springs, Nevada, requires amending the Table of Allotments in Section 73.202(b) of the FCC Rules and Regulations in the following manner:

<u>City</u>	<u>Channel</u>	
	<u>Present</u>	<u>Proposed</u>
Kingman, AZ	234C,260C2,290C1	234C,261C2,290C1
Mountain Pass, CA	258B	259B
Indian Springs, NV	257A	257C
St. George, UT	228A,240C,259C	228A,240C,260C

The following counter-proposal amendment of the FM Table of Allotments is requested.

<u>City</u>	<u>Channel</u>	
	<u>Present</u>	<u>Proposed</u>
Indian Springs, NV	257A	272C

An FM allocation study shows Channel 272C can be allotted to Indian Springs, Nevada, according to the Commission's minimum distance separation rules (Section 73.207) and without deletion or substitution of any other existing assignment or allotment.

The attached map (Exhibit E-1) shows the minimum separation arcs from the pertinent FM stations for Channel 272C operation at Indian Springs, Nevada, and the area where a fully-spaced antenna site for the proposed FM station can be located.

A reference antenna site within this area has been selected for illustrative purposes which meets the minimum distance separation requirements to all the existing and proposed stations and allotments. The geographic coordinates (NAD-27) of the reference site are as follows:

North Latitude: 36° 31' 00"

West Longitude: 115° 59' 35"

The reference site is located approximately 30 km west of Indian Springs, Nevada, only a short distance from the proposed reference site for Channel 257C. The attached Table I provides the distance to the nearest FM station or allotment on Channel 272 and ± 3 channels of Channel 272. The Table indicates there are no existing or proposed FM station or allotments, 53 and 54 channels removed from Channel 272, within 75 km of the reference site. All distances were computed using the FCC listed geographic coordinates and are based on Section 73.208 of the Commission's Rules.

An FM operation with 100 kW ERP and 600 meters¹ antenna height above average terrain, from the reference antenna site would provide 3.16 mV/m (70 dBu) service to all of Indian Springs, Nevada, as required by Section 73.315(a) of the Commission's Rules. The computed 3.16 mV/m contour is shown on the attached Exhibit E-1 from the reference site in relation to Indian Springs, Nevada.

The KPXC proposed allotment of Channel 257C to Indian Springs, Nevada, provides population and area figures for an assumed maximum Class C operation. KPXC further states the proposed Class C operation would provide a first service to 1,549 persons and an area consisting of 8,647 square kilometers. In addition, KPXC claims that the first FM service which could be provided is greatly enhanced by its service to a 58 kilometer section of a major interstate highway and persons employed at the Nellis Air Force Range, Nevada Test Site, Desert National wildlife Range, Death Valley National Monument and Travelers along U.S. Highway 95.

The counter-proposal to allot Channel 272C to Indian Springs, Nevada would provide superior service to all of the aforementioned areas as indicated in the following comparison:

¹An operation with 100 kW ERP and 100 meters HAAT can provide City Grade (3.16 mV/m) service to all of Indian Springs, Nevada, from the proposed reference site.

	Allotment			
	Channel 257C		Channel 272C	
	<u>population</u>	<u>area</u> sq.km	<u>population</u>	<u>area</u> sq.km
"white" area first service	1,549	8,647	3,193	14,832
Service to:				
Nellis Air Force Range	yes		yes	
Nevada Test Site	yes		yes	
Desert National Wildlife Range	yes		yes	
Death Valley National Monument	yes		yes	
First service to portion of I-95 (approximate)	58 km		93 km	

It has been demonstrated above that Channel 272C (102.3 MHZ) can be allotted to Indian Springs, Nevada, according to the minimum distance separation requirements of Section 73.207 of the Commission's Rules, and there is a large area available west of the community for an antenna site. Therefore, KHYZ requests the Commission to amend Section 73.202 of its Rules to allot Channel 272C to Indian Springs, Nevada, and delete Channel 257A. It is further requested the Commission reserve the higher power Channel 272C for FM station KPXC.

COHEN, DIPPELL AND EVERIST, P. C.

TABLE I
FM ALLOCATION SITUATION
FOR THE PROPOSED FM ALLOTMENT
OF CHANNEL 272C TO INDIAN SPRINGS, NEVADA
OCTOBER 1996

<u>Channel</u>	<u>Call</u>	<u>City/State</u>	<u>Geographic Coordinates (NAD-27)</u>	<u>Distance</u>	
				<u>Actual *</u> km	<u>Required</u> km
272C	Ref. Site	Indian Springs, NV	36-31-00 115-59-35	--	--
269C	None within 185 km		--	--	105
270C	KFMS-FM	Las Vegas, NV	36-00-28 115-00-20	105	105
271C	None within 300 km		--	--	241
272C	None within 400 km		--	--	290
272A	KZXY-FM	Apple Valley, CA	34-24-40 117-11-09	258	226
272A	KLCX	Indio, CA	33-48-07 116-13-29	302	226
272B1	KLCZ	Corcoran, CA	36-22-04 119-24-01	308	259
273C	None within 300 km		--	--	241
273A	KCNQ	Kernville, CA	35-37-21 118-26-16	242	165
274C	KFLG-FM	Bullhead City, AZ	35-14-56 114-44-37	180	105
275C	None within 180 km		--	--	105
218C	None within 100 km		--	--	48
218C	None within 100 km		--	--	48

*Rounded to nearest kilometer pursuant to Section 73.208 of FCC Rules.

EXHIBIT E - 1
ALLOCATION MAP SHOWING
FULLY SPACED ANTENNA SITE AREA
FOR CHANNEL 272C AND THE 3.16 mV/m CONTOUR
IN RELATION TO
INDIAN SPRINGS, NEVADA
OCTOBER 1996

COHEN, DIPPELL and EVERIST, P.C. Consulting Engineers Washington, DC

